No. 80076-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 56614-8-I

JOSEPH A. SIMONETTA and JANET E. SIMONETTA,
Plaintiffs/Appellants/Respondents on Review,

v.

VIAD CORP,
Defendant/Respondent/Petitioner on Review,

ON REVIEW FROM THE COURT OF APPEALS, DIVISION I

SUPPLEMENTAL BRIEF OF PETITIONER VIAD CORP

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I. INTRODUCTION

The Court of Appeals erred in holding that a manufacturer of an uninsulated Naval marine evaporator[1] may have a duty to warn potential users regarding the dangers of asbestos insulation applied after the evaporator left its control.

Viad Corp's ["Viad"] alleged predecessor, Griscom-Russell,[2] sold the evaporator without insulation and did not manufacture, sell, or supply insulation materials. Even though Simonetta offered some evidence that the evaporator required insulation and the manufacturer would have known the Navy would use asbestos-containing insulation, Griscom-Russell had no control over the Navy's decision, or the methods by which the insulation was applied and removed.

Under the law in the State of Washington and elsewhere, the duty to warn properly lies with the entities in the chain of distribution of the product that produced the harm. Here, no feature, aspect or characteristic of the design and construction of the evaporator caused Simonetta's lung injury. He inhaled no part of Griscom-Russell's product. Nor was the

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[1] Evaporators are also known as distilling plants or sea water distillers.

[2] Viad is being sued in this action for the failure of its alleged predecessor Griscom-Russell to warn of risks associated with thermal asbestos insulation attached, post-manufacture and sale, to Griscom-Russell's evaporator. Viad disputes the claim that it has successor liability, but for the purposes of this Petition, the Court may assume that Viad is a corporate successor to Griscom-Russell.

evaporator expected to contain or prevent the release of dust from external insulation material.

Viad respectfully asks this Court to reverse the Court of Appeals' novel expansion of the duty to warn as contrary to the overwhelming weight of authority and failing to serve the ends of justice and the public policy underlying products liability.

II. STATEMENT OF THE CASE

A. Factual Background

This is an asbestos personal injury case in which Simonetta sued Viad and several other companies claiming he developed lung cancer as a result of working around asbestos products. Simonetta's claims arise from his Naval service on the USS Saufley. During 1959 to 1960, while serving as a Third Class Machinists Mate, on one occasion, Simonetta partially removed exterior insulation from the Saufley's evaporator in order to repair and clean an internal tube bundle. CP 173-179, 189-198, 195-197. It is undisputed that Griscom-Russell sold the evaporator to the Navy without insulation and that the Navy or its third-party contractors applied insulation after delivery. CP 993 (lines 3-9). There is no evidence that Griscom-Russell recommended or specified the use of asbestos insulation with its evaporator.

Simonetta submitted evidence that the evaporator had to be insulated in order to operate properly and safely, CP 744 (p. 170:15-170:19), and that Griscom-Russell would know the Navy used asbestos-containing insulation.[3] CP 744 (p. 170:15-172:20). Simonetta also submitted a Griscom-Russell operations and maintenance manual describing how to remove, repair and clean the tube bundles inside an evaporator. CP 773-782. The manual does not state whether the evaporator should be insulated, what type of insulation should be used, or how to remove and replace insulation in order to access internal parts. *Id.*

B. Procedural Background

Simonetta sued seventeen defendants alleging asbestos exposure caused his lung cancer and asserting a failure to warn claim sounding in

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[3] The Court of Appeals opinion characterizes as "undisputed" Griscom-Russell's knowledge that its evaporator would necessarily be used with asbestos insulation. This purported finding of fact is unsupported by the record. Neither party moved the trial court to make a factual determination as to whether the evaporator could properly operate without insulation, whether alternates to asbestos insulation were used by the Navy, and whether Griscom-Russell knew or should have known that its evaporators would be insulated with asbestos-containing materials. Simonetta argued to the trial court that the question of whether asbestos was necessarily used with Griscom-Russell's product constituted a material issue of fact for a jury to decide. CP 993-4. Viad did not present evidence on this issue because, according to Viad's theory of the case, it was immaterial to the outcome of the litigation. CP 1029-30. Viad had no logical reason, motive or opportunity to controvert Simonetta's factual assertions because it was seeking summary judgment. In fact, Viad can produce evidence that the Navy used non asbestos insulation on evaporators and that the Navy did not classify evaporators as a high temperature application requiring only asbestos. Any finding of fact adverse to Viad is patently improper, especially where Viad was the moving party, there was no cross motion, and the trial court entered summary judgment in Viad's favor. (For further discussion on this issue and supporting authority please see Viad's Motion for Reconsideration and/or Clarification filed with the Court of Appeals.)

negligence and strict products liability. CP 24-28. Viad moved for summary judgment. CP 42-60. King County Presiding Asbestos Judge, The Honorable Sharon Armstrong, granted Viad's motion on the duty to warn with respect to asbestos insulation products holding that "Although the product manufacturer knew or should have known that its product would be insulated with asbestos containing material, the product itself did not produce the injury." CP 1194-96; *see also* CP 1228-30.[4]

The Court of Appeals reversed, holding that Griscom-Russell may have had a duty to warn about the dangers of respirable asbestos fiber released during the reasonable use of its product:

> When a product requires the use of another product and the two together cause a release of a hazardous substance, the manufacturer has a duty to warn about the inherent dangers.

Simonetta v. Viad Corp., 137 Wn. App. 15, 31-32, 151 P.3d 1019 (2007). With respect to the common law negligence claim, the Court of Appeals held there were questions of fact as to whether Griscom-Russell had a duty to warn of the risk of asbestos exposure during service of its evaporator in light of evidence of the certainty that the evaporators would need to be insulated to operate properly, that the Navy used asbestos insulation and

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[4] For a more detailed discussion of procedural background please see Viad Corp's Brief of Respondent, pp. 6-8 and Viad Corp's Motion for Reconsideration and/or Clarification, pp. 3-7.

that workers would have to disturb the asbestos insulation to perform maintenance. *Simonetta,* 137 Wn. App. at 25. With respect to the strict liability claim, the court held there were questions of fact as to whether Griscom-Russell had a duty to warn about the insulation to be placed on its evaporators in light of the evidence that its evaporators required the use of insulation that would release a hazardous substance upon proper use. *Simonetta,* Wn. App. at 31.

The Court of Appeals administratively linked the instant case with a matter involving a similar factual pattern and reached a similar conclusion, *Braaten v. Saberhagen Holdings,* 137 Wn. App. 32, 151 P.3d 1010 (2007). The Court of Appeals denied Viad's Motion for Reconsideration and/or Clarification on March 23, 2007. On January 9, 2008, this Court granted Viad's Petition for Review.

III. ARGUMENT

A. The fundamental tenets of product liability law in Washington and elsewhere confine the duty to warn to entities within the chain of distribution of a dangerous product

The Court of Appeals characterized the issue as one of first impression and acknowledged that its decision extended the manufacturer's duty beyond traditional bounds. *Simonetta,* 137 Wn. App. at 25, 29; *see also Braaten,* 137 Wn. App. at 42. Indeed, no Washington case has held that a product manufacturer has a duty to warn, under either negligence or strict

liability principles, for the dangers associated with a product it did not manufacture or supply. To the contrary, a substantial body of common law developed in this jurisdiction restricts the scope of the duty to warn to those in the chain of distribution of the dangerous product. Traditionally, the parties liable for dangerous products included only the entities that supplied, made or designed the product.[5] The reach of liability did not extend to those who played no role in the design, manufacture or marketing of the dangerous component. *See e.g., Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wn. App. 12, 19, 84 P.3d 895 (2004)(noting that "under the common law component sellers are not liable when the component itself is not defective").

In extending the duty to warn beyond the traditional bounds, the Court of Appeals relied on *Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 570 P.2d 438 (1977), *Wright v. Stang Manufacturing Co.*, 54 Cal.App.4th

[5] *Nigro v. Coca-Cola Bottling, Inc.*, 49 Wn.2d 625, 305 P.2d 426 (1957)(holding under negligence theory that the proof that the defendant supplied the product causing the injury was "the essential element of [the plaintiff's] case"); *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987)(holding in asbestos product liability case under the negligence theory that "in order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury"); *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969)(adopting RESTATEMENT (SECOND)OF TORTS §402Awhich limits the doctrine of strict product liability to "person engaged in the business of selling products"), *Little v. PPG Industries, Inc.*, 19 Wn. App. 812, 579 P.2d 940 (1978), *affirmed*, 92 Wn.2d 118, 124, n. 4, 594 P.2d 911 (1979)(in the negligence product liability case upholding the jury instruction stating that "the plaintiff has the burden of [proving] that the defendant failed sufficiently to warn of the dangers inherent in its product"). For further analysis of pertinent Washington case law please see Viad Corp's Respondent's Brief at pp. 11-22 and Viad Corp's Petition for Review, pp. 6-14.

1218, 63 Cal.Rptr.2d 422 (1997), and *Stapleton v. Kawasaki Heavy Industries, Ltd.*, 608 F.2d 571 (5th Cir. 1979). These cases are inapposite.

In *Teagle,* the manufacturer of a flowrater device failed to provide a warning that Viton O-rings should not be used to seal the flowrater. The *Teagle* court held that "[the manufacturer] knew that Viton O-Rings were incompatible with ammonia, yet it did nothing more than recommend the use of Buna O-rings. It did not warn of the dangers which could result from using Viton O-rings with ammonia. The lack of this warning, by itself, would render the flowrater unsafe." *Teagle,* 89 Wn.2d at 156.

The Court of Appeals correctly pointed out the apparent factual distinctions between *Simonetta* and *Teagle.* Indeed, the harm from the flowrater stemmed from the failure that occurred when it exploded. Here, the evaporator did not fail. It functioned as designed. *Simonetta,* 137 Wn. App. at 30-31; *see also Braaten,* 137 Wn. App. at 44. In view of this conceptually critical distinction, *Teagle* does not support the imposition of a duty to warn on Griscom-Russell. Under *Teagle,* the duty to warn rests with the entity whose product caused the injury (e.g. the flowrater in *Teagle* or the asbestos insulation in the instant case). This is in accord with Viad's argument below, as well as with the overwhelming weight of authority, limiting the duty to warn to the entities that manufactured or supplied the product causing harm.

The same principle distinguishes *Wright v. Stang Manufacturing Co.*, 54 Cal.App.4th 1218, 63 Cal.Rptr.2d 422 (1997). In *Wright*, a firefighter was injured when the deck gun broke loose from the firetruck's mounting assembly manufactured by another party. *Id.*, at 1222. Because Standard Manufacturing supplied the deck gun that caused the injury, it had a duty to warn that the deck gun could become loose due to a "water hammer" effect when used with certain types of risers. *Wright* is inapposite because the deck gun injured the firefighter. Here, the evaporator did not harm Simonetta.

In *Stapleton*, a homeowner sued the manufacturer and distributor of a Kawasaki motorcycle for fire damage that occurred when the motorcycle tipped over. Because the fuel switch had been left in the "on" position, gasoline leaked from the tank and was ignited by the pilot light in a heater. *Stapleton*, 608 F.2d at 572. The Fifth Circuit held that Kawasaki's failure to adequately warn of the potential dangers of keeping the fuel switch in the "on" position was sufficient to impose liability under both negligence and strict liability theories. *Id.*, at 572.

Stapleton does not support the imposition of a duty to warn on a manufacturer in Griscom-Russell's position. Kawasaki designed the motorcycle's gasoline tank to contain gasoline. The tank failed to perform its function and permitted gasoline to leak when the motorcycle was in a

horizontal position. Because Kawasaki failed to provide an adequate warning on how to properly use the tank valve, its product posed an inherent danger. In contrast, the evaporator was not designed to contain or prevent the release of dust from external insulation. It did not fail its intended purpose.

Lindstrom v. A-C Product Liability Trust, 424 F.3d 488 (6th Cir. 2005) is the most analogous case cited below. The plaintiff in *Lindstrom* alleged asbestos exposure during his career as a merchant seaman. *Id,* at 491. His claims were based on both negligence and strict liability theories. *Id.,* at 492. Among other defendants, he sued manufacturers of feed pumps, air compressors, and valves for exposure to external asbestos insulation, as well as internal asbestos-containing sheet packing and gaskets. Coffin Turbo Pump, for example, manufactured feed pumps which undisputedly came without asbestos insulation; any insulation put on them was the product of another manufacturer. *Id.,* at 496. The Court held that Coffin Turbo was not liable to the plaintiff for exposure to asbestos insulation because Coffin Turbo could not be held responsible for the asbestos contained in another's product. *Id.*[6]

[6] For further discussion of the *Lindstrom* decision please see Viad's Respondent's Brief at pp. 22-25.

The Court of Appeals was quick to dismiss the wisdom of the *Lindstrom* decision on the basis that "the issue [in that case] was causation not the existence of a duty." *Simonetta,* 137 Wn. App. at 27, *see also Braaten,* 137 Wn. App. at 42. This characterization is misplaced. The Sixth Circuit exculpated Coffin Turbo because the asbestos products "to which Lindstrom was exposed [..] were not manufactured by Coffin Turbo, but rather products from another company that were attached to a Coffin product." *Lindstrom,* 424 F.3d 496. Because Coffin Turbo's feed pumps *did not cause* the plaintiff's injury, it could not be said that Coffin Turbo had any duty to warn. This is precisely the reasoning the trial court applied in granting Viad summary judgment below.

Lindstrom indisputably stands for the proposition that a manufacturer can be liable for his own product, but not for asbestos-containing products that may be attached or connected to his product by others. There is no reason in law, fact, or logic why this Court should not adopt the *Lindstrom* rationale in this jurisdiction. In fact, the striking factual similarities between the two cases weigh heavily in favor of applying this bright line rule to Griscom-Russell's evaporator, which had no mechanical defects and did not in any meaningful sense cause Simonetta's harm.

Courts from other jurisdictions similarly refused to impose liability under analogous facts.[7] The lesson to be drawn from these cases is that the Court of Appeals' overly expansive duty to warn is inconsistent with the vast majority of decisions nationwide.

The Court of Appeals constructed the artifice that the evaporator itself was dangerous and caused harm. Semantics cannot place Griscom-Russell in the chain of distribution of the "relevant product" within the meaning of *Sepulveda-Esquivel,* 120 Wn. App. 12, 84 P.3d 895 (2004). Nor does this semantical argument prove that a dangerous feature of the evaporator, in addition to asbestos, produced the harm.

There is no denying that at the time of its manufacture, Griscom-Russell's evaporator was not mechanically defective, did not fail its

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[7] *See e.g. Cipollone v. Yale Industrial Products, Inc.,* 202 F.3d 376 (1st Cir. 20002)(no duty to warn on the part of a manufacturer of a dock lift for the injury caused by the final assembly incorporating such lift); *Newman v. General Motors Corp.,* 524 So. 2d 207 (4th Cir. 1988)(a manufacturer of a specialized trailer is not liable for defects causes by a defective ratchet assembly attached to the manufacturer's product by a third party post-sale); *Baughman v. General Motors Corp.,* 780 F.2d 1131 (4th Cir. 1986)(a manufacturer of a truck is not liable for injuries caused by an explosion of a wheel because the truck manufacturer did not design, manufacture, or place the wheel into the stream of commerce); *Garman v. Magic Chef, Inc.,* 117 Cal. App.3d 634, 173 Cal. Rptr. 20 (1981)(stove manufacturer has no duty to warn that the stove's flame could ignite gas leaking from another source); *Marie Cleary v. Reliance Fuel Oil Assocs.,* 17 A.D.3d 503, 793 N.Y.S.2d 468 (N.Y. App. Div. 2d Dep't, 2005), *affirmed,* 5 N.Y.3d 819 (N.Y.Nov. 17, 2005)(water heater manufacturer has no duty to warn of potential defects caused by improper installation of an aquastat in its product); *Wiler v. Firestone Tire & Rubber Co.,* 95 Cal. App. 3d 621 (1979)(tire manufacturer is not liable for damages caused by a faulty tire valve stem manufactured and installed by another manufacturer); *Rastelli v. Goodyear Tire & Rubber,* 79 N.Y.2d 289, 591 N.E.2d 222 (1992)(tire manufacturer not liable for failure to warn of the danger of using the tire on a multi-piece rim).

intended purpose, and presented no asbestos exposure hazard. Any subsequent application of external asbestos insulation by the Navy did not make the evaporator dangerous. Its mechanical features and operational principles of desalinating sea water remained unchanged. The danger arose exclusively from asbestos insulation and was not enhanced by the evaporator.

As a matter of law and fairness, the Court of Appeals should have properly limited the duty to warn to the suppliers of asbestos insulation, who had control over the manufacture and sale of insulation products, and to the Navy, who had control over the methods used to install and remove insulation.[8] The mere fact that these entities may not be amenable to judgment does not justify the imposition of liability on Griscom-Russell. *George v. Parke-Davis*, 107 Wn.2d 584, 590, 733 P.2d 507 (1987)("we do not premise liability on manufacturers solely because of their ability to pay tort judgments").

B The public policy considerations weigh against the extension of the duty to warn to entities that did not manufacture or supply the product causing harm

Our courts traditionally have used a policy-oriented approach in deciding questions of duty in product liability cases. *See e.g. Lunsford v.*

[8] The evidence of record in the *Braaten* case shows that the Navy was well aware of the health hazards associated with asbestos exposure and in 1958 published the Navy's

Saberhagen Holdings, Inc., 125 Wn. App. 784, 812, 106 P.3d 808 (2005). Here, the Court of Appeals does not expressly offer any public policy considerations supporting its analysis. The decision promotes maximum compensation to plaintiffs in asbestos litigation, without giving due consideration to the interests of product manufacturers. The Court of Appeal's result-oriented approach is apparent from the *Braaten* court's sentiment that "the manufacturers of the hazardous substance are, for the most part, no longer amenable to judgment". *Braaten*, 151 Wn. App. at 45.

This policy analysis is misguided. First, imposing liability on a product manufacturer simply because it is still amenable to judgment is unjust and contradicts Washington law. *See George*, 107 Wn.2d at 590. Second, Simonetta is not without remedy. He is entitled to monetary compensation from insolvent manufacturer's bankruptcy trusts. *See* Charles E. Bates & Charles H. Mullin, *Having your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006)(noting that, "For the first time ever, trust recoveries may fully compensate asbestos victims."). Also, asbestos victims have viable sources of recovery through the civil courts system against solvent asbestos product manufacturers and through the federal and state worker's compensation schemes. The mere

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Safebook for Pipefitters which stated: "Asbestos dust is injurious if inhaled. Wear an

circumstance that Simonetta chose not to pursue these remedies does not warrant a shift of liability to Griscom-Russell.

The Court of Appeals' holding is not only unsupported by the existing law, but also fails to serve the ends of justice and public policy historically underlying the development of products liability laws since their inception. Public policy demands that the burden of accidental injuries caused by products intended for consumption be treated as a cost of production. *Lunsford,* 125 Wn. App. at 792-93 (quoting RESTATEMENT (SECOND) OF TORTS § 402A, comm. c (1965)). Because Griscom-Russell did not produce or market the insulation, it cannot treat the burden of accidental injuries as a cost of production and spread the cost among users of the product.

The imposition of product liability is based on the principle that damages shall be borne by the party who is in the best position to eliminate the danger. *Blackburn v. McLaughlin,* 128 Misc. 2d 623, 625, 490 N.Y.S.2d 452 (N.Y. 1985). This policy spreads the burden equally on the entities in the direct chain of manufacture or marketing, and it serves to pressure and encourage the party responsible for the defect to develop a safer and more attractive product. *Id.* Obviously Griscom-Russell had no real opportunity to make insulation products safer.

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approved dust respirator for protection against this hazard." *Braaten,* CP 281.

Undisputedly, the public has the right to expect that reputable sellers will stand behind their products. *Lunsford,* 125 Wn. App. at 812. Griscom-Russell would be rightfully expected by the public to "stand behind" its evaporator and accept liability for harm proximately caused by the evaporator. Yet, no public policy reason justifies requiring Griscom-Russell to take responsibility for a product it did not produce and had no role in placing in the stream of commerce.

It is not only unjust to impose a duty to warn on Griscom-Russell for the decision of insulation manufacturers to incorporate asbestos in their insulation product formula or for the decision by the Navy to use asbestos insulation instead of other non-asbestos forms of insulation, but it is also inefficient. Warnings issued by Griscom-Russell would be duplicative of the insulation manufacturer's warnings, potentially inconsistent with them and thereby confusing. Moreover, a warning would be inappropriate and misleading if the user insulated the evaporator with non-asbestos material.

When this Court extended strict liability to product sellers, it noted that the dealer is in position "to argue out with the manufacturer any questions as to their respective liability." *Seattle-First Nat. Bank v. Tabert,* 86 Wn.2d 145, 149, 542 P.2d 774, 776 (1975). A manufacturer in the position of Griscom-Russell has no basis on which to "argue it out with the [insulation] manufacturers." It has no legally cognizable relationship

with the manufacturers and cannot protect itself with an express indemnity provision or an implied warranty claim such as this Court enforced in *Central Washington Refrigeration, Inc. v. Barbee,* 133 Wn.2d 509, 946 P.2d 760 (1997). There are simply no satisfactory tort remedies available to Griscom-Russell. Ironically, the imposition of liability in these circumstances leaves Griscom-Russell in a worse position than an entity that sells but does not manufacture asbestos insulation.

C. The Court of Appeal's extension of the duty to warn beyond traditional limits will impose untoward burden on product manufacturers and the public at large

To impose on Griscom-Russell a duty to warn about a different manufacturer's product would, in the words of one California court, "place on each manufacturer an untoward duty." *Powell v. Standard Brands Paint Co.,* 166 Cal. App.3d 357, 365, 212 Cal.Rptr. 395 (1985). This drastic expansion of liability could have far-reaching effects. The universe of entities that would be affected by the decision is not limited to asbestos defendants, but encompasses legions of product manufacturers and suppliers in Washington and nationwide. Thus, in reviewing the Court of Appeals' decision, this Court should be mindful of precedential and consequential future effects of its ruling. *Hamilton v. Beretta U.S.A. Corp.,* 96 N.Y.2d 222, 232, 727 N.Y.S.2d 7 (2001)("in determining

whether a duty exists, courts must be mindful of the precedential, and consequential, future effects of their rulings...").

Washington courts have refused to impose liability on a product manufacturer when the product itself is not defective but is used with a product that is dangerous because the manufacturer would be required "to review the decision of the business entity charged with responsibility for the integrated product." *Sepulveda-Esquivel,* 120 Wn. App. at 19. Under the Court of Appeals' holding, Griscom-Russell would be forced "to develop sufficient sophistication to review the decision of the business entity that is already charged with responsibility for the integrated product", *i.e.* the manufacturers of asbestos insulation products and the Navy. *Id.* Because asbestos products may be used with its evaporator, Griscom-Russell would have had to engage in a mammoth undertaking of developing a high level of sophistication in asbestos-related diseases. Even though Griscom-Russell derived no revenue from sales of asbestos-containing products, it would be compelled to become an expert on asbestos, occupational medicine, epidemiology, pulmonology, pathology, as well as many other fields of medicine and science.

Consider the litany of products that could be potentially used in connection with Griscom-Russell's evaporator during its useful life, *e.g.,* various types of insulation products, solvents, lubricants, paints, etc.

Griscom-Russell would have to internalize the costs of developing technical expertise about other manufacturers' products that may be used in connection with its evaporators. This imposes too great a hardship on manufacturers in Griscom-Russell's position. It is fundamentally unfair to expect Griscom-Russell to become an expert on the safety of products beyond its fields of technical expertise, especially where it had no reason or opportunity to inspect, test and evaluate the products. The cost of developing such expertise is wasteful, duplicative of costs incurred by the manufacturer of the dangerous product, and provides little to no additional margin of safety.

Furthermore, the Court of Appeals' placement of a duty to warn of dangers in another manufacturer's product has great potential for undermining consumer safety by promoting warnings proliferation. This problem, sometimes referred to as the "Boy Who Cried Wolf" problem, stems from the notion that multiple and often inconsistent warnings threaten to render *all* warnings meaningless.

Finally, there is a large number of asbestos cases pending in the Washington trial courts against Viad and other similarly situated equipment manufacturers based on exposure to external asbestos insulation products. The Court of Appeals' unprecedented decision now makes Washington a destination forum for similar asbestos cases from

other jurisdictions. This trend will continue to tax this State's judicial resources and promote "forum-shopping" by enterprising plaintiffs' lawyers from other jurisdictions.

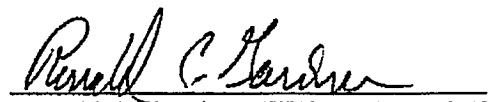
The decision creates new theories of liability that will apply to manufacturers of a wide variety of products. Any time a purchaser is required to combine a product with another product in order to use the first product, the manufacturer of the first product may now be subject to liability if the second product possesses dangerous characteristics. This is true even if the manufacturer's product was otherwise safe, and the manufacturer exercised reasonable care to discover and warn about dangers associated with the second product. Examples include manufacturers of wood products that require paint for proper use. Are they now subject to liability for harm caused through the past use of lead paint? Is the manufacturer of a steam pipe now subject to liability for the asbestos insulation it knew would be used to insulate the pipe so that it could properly and safely transport steam? Must the orange juice producer warn of the dangers of alcohol intoxication because orange juice is often mixed with vodka?

IV. CONCLUSION

Viad respectfully requests that this Court affirm the trial court's summary judgment order dismissing Simonetta's failure to warn claims, as well as reverse and vacate the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 8th day of February, 2008.

GARDNER BOND TRABOLSI PLLC



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SIMONETTA

Plaintiff/Petitioner

vs

No. 80076-6
DECLARATION OF
EMAILED DOCUMENT
(DCLR)

VIAD CORP

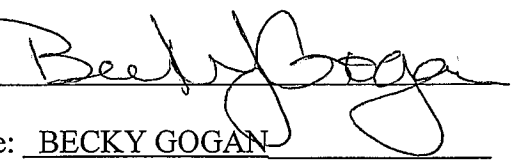
Defendant/Respondent

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing facsimile transmission for filing.
2. My address is: 119 W. Legion Way, Olympia, WA 98501
3. My phone number is (360) 754-6595
4. The e-mail address where I received the document is: oly@abclegal.com.
5. I have examined the foregoing document, determined that it consists of 25 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: February 8, 2008, at Olympia, Washington.

Signature: 

Print Name: BECKY GOGAN

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DECLARATION OF SERVICE

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Viad Corp

I, Kristen D. Johnson declare as follows:

I am over the age of 18 and am otherwise competent to make this declaration. This Declaration is made upon personal knowledge setting forth facts I believe to be true.

That on February 8, 2008, I caused to be served a true and correct copy of Supplemental Brief of Petitioner Viad Corp on the following counsel of record:

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DATED: February 8, 2008.

By _____
Kristen D. Johnson
Legal Assistant to Ronald C. Gardner

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3. My phone number is (360) 754-6595
4. The e-mail address where I received the document is: oly@abclegal.com.
5. I have examined the foregoing document, determined that it consists of __3__ pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: __February 8, 2008__, at Olympia, Washington.

Signature: _____

Print Name: BECKY GOGAN